

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

MAX MOUSSAZADEH,

Plaintiff,

v.

TEXAS DEPARTMENT OF CRIMINAL  
JUSTICE;

BRAD LIVINGSTON, solely in his official  
capacity as Executive Director of the Texas  
Department of Criminal Justice; and

DAVID SWEETEN, solely in his official  
capacity as warden of the Eastham Unit of the  
Texas Department of Criminal Justice,

Defendants.

Civil Action No. 3:07-cv-00574  
JURY

**PLAINTIFF MAX MOUSSAZADEH'S REPLY IN SUPPORT OF MOTION TO STRIKE**

Plaintiff Max Moussazadeh hereby submits the following Reply in support of his Motion to Strike (Dkt. No. 203). The three reasons advanced by Defendant Texas Department of Criminal Justice ("TDCJ") for denying the Motion all lack merit. The Court should therefore grant Plaintiff's Motion to Strike.

*First*, TDCJ argues that Plaintiff's Motion to Strike is an untimely "response" to Defendants' Motion for Summary Judgment, but that argument fails on numerous counts. *See* Defs.' Resp. in Opp. to Pl.'s Mot. to Strike at 2 (Dkt. No. 207) ("TDCJ MTS Opp."). Plaintiff's Motion is precisely that—a "motion," not a "response." The Court's order setting filing deadlines for "responses" to *dispositive* motions is silent on the timing of *evidentiary* motions. *See* Order Granting Extension of Time at 1 (Dkt. No. 194) (setting deadlines for "[d]ispositive

motions,” as well as “responses” and “[r]eplies” thereto, but not for evidentiary motions). And at any rate, TDCJ barely relied on the challenged errata sheet and affidavits in its Motion for Summary Judgment; rather, the bulk of TDCJ’s discussion of those documents came in its Opposition to Plaintiff’s Motion for Summary Judgment. *See* Defs.’ Resp. in Opp. to Pl.’s Mot. Summ. J. at 10-11 (Dkt. No. 200). As soon as TDCJ attempted to use those documents to manufacture a factual dispute in its Opposition, Plaintiff began preparing a Motion to Strike the documents and filed two weeks later.<sup>1</sup> Plaintiff’s Motion was hardly untimely.

*Second*, TDCJ argues that its own failure to meet the deadline for submitting the Dunbar errata sheet was a case of “excusable neglect,” but its excuse is far from compelling. TDCJ blames its lateness on the “Thanksgiving holidays,” even after it admits that it sought and received from Plaintiff an extension from 30 days to 45 days and, in doing so, agreed to submit the errata sheet by November 27, 2010. TDCJ MTS Opp. at 2-3. If TDCJ didn’t believe the Thanksgiving holiday would allow it to submit the errata sheet by November 27, it should not have agreed to that date at the deposition. Indeed, by holding onto the errata sheet past November 27, TDCJ not only missed an important deadline, but also prejudiced Plaintiff, who was made aware of Dunbar’s wholesale reversal of her testimony a mere *two days* before dispositive motions were due. *See* Pl.’s Mot. Summ. J. at 38 n.17 (Dkt. No. 199). TDCJ’s “neglect” was not excusable; if anything, it appears calculated to gain an unfair advantage.

*Third*, TDCJ argues that under *Reilly v. TXU Corp.*, 230 F.R.D. 486 (N.D. Tex. 2005), it was permitted to concoct a factual dispute days before summary judgment briefing by rewriting Ms. Dunbar’s substantive deposition testimony. *Reilly*, however, directly contradicts TDCJ’s

---

<sup>1</sup> TDCJ, on the other hand, waited almost a month after Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment to file its own Motion to Strike. *See* Defs.’ Mot. to Strike (Dkt. No. 206).

contentions. The *Reilly* court expressly declined to extend its “broad view” of Rule 30(e), which governs deposition changes, to “the context of a court’s determination of a summary judgment motion.” *Id.* at 490-91. The court explained that “no summary judgment motion [was] currently pending,” and that it may well have come to a different conclusion if the case had reached the summary judgment phase. *Id.* at 491. In fact, the court cited with approval two cases holding that deposition changes should “face a heightened standard of review if they have the potential to affect summary judgment.” *Id.* (quoting *Summerhouse v. HCA Health Servs.*, 216 F.R.D. 502, 508 (D. Kan. 2003), and citing *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 7, 9 (D.D.C. 2004)). As such, the only case law TDCJ was able to muster in support of its arguments completely undermines those arguments.

### CONCLUSION

For the foregoing reasons, Plaintiff Max Moussazadeh respectfully requests that this Court grant his Motion to Strike.

Dated: March 4, 2011

Respectfully submitted,

/s/ Eric Rassbach

Eric Rassbach  
Texas Bar No. 24013375  
Luke Goodrich  
Admitted *Pro Hac Vice*  
THE BECKET FUND FOR  
RELIGIOUS LIBERTY  
3000 K Street  
Suite 220  
Washington, D.C. 20007  
Telephone: 202-955-0095  
Fax: 202-955-0090  
erassbach@becketfund.org  
lgoodrich@becketfund.org

/s/ Matthew T. Murchison

Anne W. Robinson (Attorney-In-Charge)  
James C. Knapp  
Matthew T. Murchison  
Admitted *Pro Hac Vice*  
LATHAM & WATKINS LLP  
555 11th Street, N.W.  
Suite 1000  
Washington, D.C. 20004  
Telephone: 202-637-2200  
Facsimile: 202-637-2201  
anne.robinson@lw.com

*Counsel for Max Moussazadeh*

**CERTIFICATE OF SERVICE FOR ELECTRONIC FILING**

I, Matthew T. Murchison, do hereby certify that I have electronically submitted for filing a true and correct copy of the above and foregoing document in accordance with the Electronic Case Files System of the Southern District of Texas, on March 4, 2011.

/s/ Matthew T. Murchison

Matthew T. Murchison